The Indiana Prosecutor

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NEW CODE OF JUDICIAL CONDUCT UNDER REVIEW

The Indiana Supreme Court will amend the Indiana Code of Judicial Conduct after judges, lawyers, and the public review a draft of the Rule. In late 2007, a committee of the Judicial Conference of Indiana studied the 2007 American Bar Association Model Code of Judicial Conduct and drafted a similar Indiana Code. The Committee's draft is posted on the Supreme Court's website, and the Court will consider all comments before it issues the 2009 Code of Judicial Conduct later this year.

The new Code emphasizes the "three i's" of judicial conduct - independence, integrity, and impartiality - and continues to hold judges to strict standards of conduct in all their activities. The Rule not only sets out clear rules of judicial conduct, which, if violated, subject judges to discipline by the Supreme Court, it also includes aspirational ethical principles intended as guidance for Indiana's judges and judicial candidates.

Specifically, the new Code encourages judges to reach out to the public to promote understanding of the judicial system, specifies that a judge may take measures to ensure that unrepresented litigants have fair hearings, and assures judges that they properly may confer with unbiased colleagues about cases and issues. Additionally, the new Rule imposes clear parameters for reimbursement of expenses to judges who attend private legal seminars, recognizes domestic partners as family members in its conflicts of interests rules, and requires judges to remove themselves from cases if they made campaign statements committing themselves to particular outcomes. The Ethics Committee's proposed Indiana Rule incorporates these and many other aspects of the new Model; its most substantial changes to the Model Rules are about restrictions on judges' business interests and the limits on judges' political activities.

The Ethics Committee draft is at http://courts.in.gov/code along with various other documents relating to this project, including the current Indiana Code, the 2007 ABA Model, and a roster of Ethics Committee members. The legal profession and the general public all are encouraged to submit their comments for consideration by the Supreme Court when it updates and revises Indiana's Code of Judicial Conduct. ✦

Inside this Issue

NDAA NEWS

This is to inform the members of the National District Attorneys Association that Tom Charron, the Executive Director, has decided that he will not seek to extend his contract with NDAA as Executive Director and the Executive Committee has decided to not recommend to the Board of Directors that an extension of the contract occur. His contract expires May 31, 2008. The Executive Committee did evaluate all of the options available and has concluded that under the terms of our contract with Tom he is entitled to remain on our payroll until that time under any circumstances.

Until the selection of a new Executive Director is completed, Mary Galvin and David LaBahn will be responsible for the management of the Association, with Mary as interim Executive Director, being ultimately responsible to the Board of Directors and the Executive Committee. Mary will regularly be in Alexandria evaluating the entire operation of our Association and taking measures to improve our financial situation as well as the perception of our Association. ✦

- *Solvent defendant must pay for a defense interpreter to translate English testimony for defendant.*

Arrieta v. State, 878 N.E.2d 1238 (Ind. 1/9/2008). Defendant Jesus Arrieta was charged with dealing in cocaine as a Class A felony. At his initial hearing, the court provided a Spanish interpreter to translate the proceedings. Arrieta indicated that he would hire an attorney and subsequently posted a $50,000 bond. Prior to the first pre-trial conference the Court informed counsel that defendant would have to provide his own interpreter for further hearings. In response, the defendant filed a motion requesting a court paid interpreter. The trial court denied his motion finding that "it's Mr. Arrieta's burden to establish that he .... is unable to pay for a translator." Arrieta sought an interlocutory appeal arguing that he was entitled to a court paid interpreter regardless of his ability to pay.

In assessing the need for an interpreter, the Court noted there were two different types of interpreters utilized in the courtroom. A judge requires an interpreter to translate Non-English speaking witness testimony and responses from a defendant into English to benefit the court and jury. The Court chose to call this type of an interpreter a "proceedings interpreter." Defendants who are not proficient in English require an interpreter to translate the trial proceedings for them and to assist in their communication with counsel and the judge. The Court termed this type of an interpreter a "defense interpreter." Each interpreter serves a distinct role one person can not simultaneously serve as both a proceedings interpreter and a defense interpreter. Each interpreter serves a distinct role.

Defense interpreters are necessary to ensure the defendant's rights are preserved. Relying on *United States ex rel. Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970), the court wrote "an indigent defendant who cannot speak or understand English has the right to have his proceedings simultaneously translated to allow for effective participation." When an indigent defendant requires an interpreter, he is entitled to one paid for by the court. The question becomes what is the court's duty to bear the expense when the defendant has ample funds to hire his own?

Under the Sixth Amendment, a defendant has a right to counsel to assist in his defense. The Court of Appeals likened the need to an interpreter to the right to counsel. Noting that a defendant who can afford an attorney must hire his own, the majority found that a solvent defendant can be ordered to provide his own interpreter. The Supreme Court built on this theory. They noted that a "defense interpreter" operates in the same manner as does defense counsel, for the good of the defendant. Therefore it is appropriate for the Court to provide "defense interpreter" only for those defendants who are indigent. Defendants who possess funds may be required to provide their own "defense interpreter." However, a "proceedings interpreter" serve the entire court. As such, "proceeding interpreters" are a part of the "physical accoutrements" of the court. They are as necessary to the proceedings as a bailiff or court reporter. Therefore, when a "proceedings interpreter" is needed, it is the Court's responsibility to provide the service. ✦

- *Intent to deprive of value permanently not a required element of theft.*

Bennett v. State, 878 N.E.2d 836 (Ind. 1/9/08) (due to the brevity of the opinion we will reprint it verbatim.) "The State charged appellant Elmer Bennett with theft and auto theft, both class D felonies. The trial court found Bennett guilty and sentenced him to two years in the Department of Correction for each count, served concurrently.

Bennett appealed, challenging the sufficiency of the evidence and arguing that Indiana's theft statute requires proof that the offender intended to deprive the owner permanently of the value or use of his property. The Court of Appeals affirmed, *Bennett v. State*, 871 N.E.2d 316 (Ind. Ct. App. 2007), and got it absolutely right.

Relying on our decision in *Coff v. State*, 483 N.E.2d ___ (Ind. 1985), the Court of Appeals held that Ind. Code 35-43-4-2 (theft) and -2.5 (auto theft) do not require the State to prove that the defendant intended to deprive the owner of his property permanently. In Coff, the defendant was convicted of theft and raised the same argument on appeal that Bennett raises here. We rejected the notion that Indiana's theft statute contains the common law larceny element requiring intent to permanently deprive.

This aspect of Coff is still good law. We grant transfer and adopt the opinion of the Court of Appeals under Ind. Appellate Rule 58 (A)(1)." ✦

- *Henley v. State,* __N.E.2d___ (Ind. 2/27/08).

This case came before Supreme Court review after the denial of Henley's Post Conviction Relief Petition. Two issues of interest arose from the opinion. First, when is it an error for a court to deny counsel to a defendant? Secondly, does shooting a gun in the area of a police officer constitute facts sufficient to sustain an attempted murder conviction?

Antwain Henley and his girlfriend were walking down an Evansville street when a car pulled up to ask for

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directions. Instead of obliging, Henley pulled out a gun, shot out the back window of the car and then robbed the young ladies occupying the car. After the victims were ordered to undress, Henley put them in the trunk of the car and drove off. The broken car window caught the attention of an Evansville police officer. Seeing Henley's girlfriend in the front seat, knowing that she had a pending arrest warrant, the officer stopped the car. Henley got out and ran. A canine officer tracked Henley to a van. The dog entered the van while the handler remained outside. Henley fired four shots, one of which killed the dog. An-officer pulled Henley out of the van. The only shots fired were by Henley who was located inside the dark van while the officers were all outside the van. At trial, officers testified to hearing the shots and seeing a mussel flash but did not mention that the bullets flew by them or came close to striking them.

Henley was charged with attempted murder, kidnaping, robbery, carjacking and criminal mischief. Prior to trial, Henley asked the court to replace his public defender. When the Judge refused, Henley asked to proceed *pro se*. After adequately explaining the perils of proceeding *pro se*, the court granted Henley's request and appointed his public defender as stand by counsel. At trial Henley proceeded as counsel of record. During the examination of a witness, Henley asked that his stand-by counsel conduct the cross examination of the witness. The Court clarified whether Henley wished to allow stand-by counsel to take over the trial or whether he simply wanted assistance on that particular witness. Henley indicated that he wanted to continue as counsel and wanted assistance only as to the specific witness. Explaining that Indiana does not allow for hybrid counsel, the judge denied his request. Henley completed the two day jury trial as acting counsel. As the jury was proceeding into court for closing arguments, Henley again ask that stand by counsel be allowed to conduct closing. The record indicates a discussion between stand by counsel and the defendant where defendant refuses to relinquish control of his defense to counsel. The court summarily denied his request and Henley conducted closing. He was convicted on all counts.

Explaining that Indiana does not allow for hybrid counsel, the Court denied his request.

On direct appeal, appellate counsel presented ten arguments for review. Each was rejected and defendant's convictions were affirmed.. On petition for Post Conviction Relief, the defendant alleged ineffective assistance of appellate counsel for failing to raise denial of counsel in his appeal. Also alleged was appellate counsel's in adequate argument for a sufficiency of the evidence claim on the attempted murder.

Looking first at whether counsel was defective for failing to raise the trial court's denial of allowing standby counsel to deliver closing argument. Under *Strickland v. Washington*, 466 U.S. 668 (1984) defendant must show that counsel's actions were not only deficient but that without the error the results would have been different. Here the defendant validly waived his right to counsel well in advance of trial. Indiana does not recognize hybrid representation, the process of allowing a lawyer to conduct portions of the trial while the *pro se* defendant controls the rest. The question becomes when is a court compelled to grant counsel after the initial waiver? The Court looked to *Koehler v. State*, 499 N.E.2d 196 (Ind. 1986) which reiterated five factors a trial court should consider when deciding to allow a change in counsel status.

> "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation; (2) the reasons set forth for the request; (3) the length and stage of the trial proceedings; (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion; and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney."

Justice Rucker, writing for the court, noted that it was not *per se* error for a trial court to fail to weigh these factors before making a ruling. It was appropriate for the Appellate Court to review the record using these factors to determine whether the trial court had erred in its decision.

In reviewing defendant's prior history relating to substitution of counsel, the Court noted that defendant had attempted a temporary change in status earlier in the trial. In asking the court to have stand by counsel cross examine a witness, the defendant indicated he wanted stand-by counsel to act only as "co-counsel." When the court explained he either proceed with self representation or abandon his pro-se representation, the defendant indicated he wanted to proceed *pro se*. At the close of evidence, the defendant requested stand-by counsel complete the trial by delivering closing argument. During his argument Henley told the jury that stand-by counsel had requested he reserve a portion of the argument for counsel. The Trial Court interrupted to tell defendant he had to complete the argument himself. This attempt to force hybrid representation on the court indicated that defendant did not desire to abandon self-representation for counsel-representation. The trial court properly denied his request. As such this did not leave an error for appellate review and counsel was not deficient for failing to raise the issue.

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Sufficiency of defendant's conviction for attempted murder was introduced by appellate counsel on direct appeal. However counsel failed to support the argument by either facts or case law. The Court found that this issue carried sufficient weight that had it been argued correctly, the court would have reversed the defendant's conviction. At trial, the defendant argued that he shot at the K-9 because he was afraid the dog would kill him. Justice Rucker, noted that the defendant was not in a position to see the officer outside of the van. To prove attempt murder the state had to show the defendant intended to kill the officer who was handling the dog. Because the state could not show that the defendant was aware the officer was outside the van while he was shooting, there was no testimony that the shots fired came close to the officer, nor that Henley was pointing his gun towards the officer, the State had not proven Henley's intent to kill. The Supreme Court reversed the attempted murder conviction but affirmed all other convictions. ✦

Indiana Court of Appeals Recent Decisions

- *Use of words " State recommends" in plea agreement interpreted to mean the plea was an open plea and therefore available for appellate review of sentence.*

St. Clair Jr. v. State, ___ N.E.2d ___ (Ind. Ct. App. 2/20/08). Bruce St. Clair, Jr. was charged with sexual misconduct with a minor as both a Class C and Class D felony. The defendant and the State entered into a written plea agreement. The plea provisions included defendant's plea of guilty to the Class D felony, the State would dismiss the C felony and "recommend" a sentence of three years with 180 days executed and two and a half years on probation. During the guilty plea, defense counsel related the terms of the agreement as stated. At sentencing neither party presented an argument and the court sentenced defendant as indicated in the agreement.

A month after sentencing, the defendant filed a request for belated appeal to challenge his sentence. The state argued in response that defendant had entered into a fixed plea which was not subject to appellate review.

By a split decision, this panel of the court of appeals found that the word "recommend", given its ordinary meaning, "connotes a nonbinding suggestion." Therefore the plea agreement was an open agreement and therefore subject to appellate review. The defendant is free to argue for a lesser sentence. ✦

- *Charging information for dealing in cocaine does not need to name the person who received the cocaine.*

Reinhardt v. State, ___ N.E.2d. ___ (Ind. Ct. App. 2/15/08). Defendant Andrew Reinhardt was charged by the Hamilton County Prosecutor's Office with dealing cocaine as a Class A felony. The charging information stated in part that Andrew Reinhardt "did knowingly deliver cocaine to a confidential informant in an amount greater than three (3) grams." The facts presented showed that Andrew Reinhardt delivered cocaine to a middle man, John May. It was actually May who gave the cocaine to the confidential informant and not Reinhardt. Further, Reinhardt was not present when May delivered the cocaine to the confidential informant.

On appeal, counsel for the defense argued that his client had not delivered cocaine to a confidential informant as alleged in the charging information. Defense counsel argued there was a fatal variance between the charging information and the evidence presented which constituted fundamental error. He contended the essential difference between the proof and the wording of the charging information mislead the defense to the extent Reinhardt was prejudiced by the error.

A charging information must set forth "the nature and elements of the offense charged in plain and concise language without unnecessary repetition" IC 35-34-1-2 (a)(4). Is the person to whom the cocaine was delivered an element of the offense or simply surplus language? "An allegation is deemed surplusage when the specific facts alleged could have been entirely omitted without affecting the sufficiency of the charge against the defendant" *Winn v. State*, 748 N.E.2d 352, 356 (Ind. 2001).

The Court of Appeals noted that IC 35-48-4-1, dealing in cocaine, governs the actions of the person delivering the drug. The statute does not require that the identity of the recipient must be alleged. Judge Sullivan writing for the court stated "the State must prove that a delivery took place to someone but not to any particular person." The name of the person to whom the cocaine was delivered is surplusage. While surplusage may be so misleading as to constitute reversible error it did not do so in this case. Defense counsel was made aware well in advance of trial that co-defendant May would testify incriminating Reinhardt. Reinhardt therefore was not prejudiced by a charging information that specified he delivered cocaine to a confidential informant when in actuality he handed the cocaine to May who then completed the delivery to the confidential informant. ✦

Recent Traffic Safety Decisions

The Indiana Court of Appeals recently decided two cases involving defense challenges to the admission into evidence of hospital blood test results and/or DataMaster breath test results as evidence of guilt in an OWI trial. In both cases, the Court of Appeals held that a hospital blood test result and a DataMaster test result were properly admissible at trial as evidence of guilt despite a constitutional challenge to the 3 hour presumption created by I.C. 9-30-6-15(b), a *Crawford* challenge, and a challenge to disclosure of defendant's medical records to law enforcement pursuant to subpoena duces tecum under *HIPPA*.

♦ *Presumption of Blood Alcohol Content at Time of Offense Created by I.C. 9-30-6-15(b)*

In *Johnson v. State,* 879 N.E. 2d 649 (Ind. Ct. App. 2008) decided January 25, 2008, the Court of Appeals addressed two issues raised by the defendant after her conviction by jury for operating while intoxicated, as a class A misdemeanor and operating with an alcohol concentration equivalent to at least .08 grams of alcohol per 210 liter of breath as a class C misdemeanor. Tamara Johnson was observed by an Indianapolis Police Officer speeding in her SUV on a wet roadway. The officer followed her SUV for two blocks; however, she did not pull over. When the officer activated his siren, the SUV abruptly veered to the right side of the road and finally stopped. Ms. Johnson "fumbled" with her wallet and was finally able to produce her driver's license although she "had a hard time pulling it right out." Her eyes were red and watery, she had an odor of an alcoholic beverage on her breath, and she admitted that she had consumed "a few" glasses of wine at the Ruth's Chris Steakhouse located approximately six blocks from the scene of the stop. Johnson failed the horizontal gaze nystagmus test and the one legged stand test, but passed the walk and turn field sobriety test. She did submit to a chemical breath test that was given on a certified BAC DataMaster instrument. The test result was .09 grams of alcohol per 210 liters of breath.

At trial, Johnson filed a motion in limine and memorandum challenging the constitutionality of the rebuttable presumption created by I.C. 9-30-6-2 and I.C. 9-30-6-15(b) which was denied by the Trial Court. On appeal, the defendant argued that the presumption I.C. 9-30-6-15(b), the rebuttable presumption that the result of a certified chemical breath test administered to a defendant within three hours of the determination of probable cause to believe that the defendant has committed an offense under I.C. 9-39-5 is presumed to be the defendant's alcohol concentration at the time he or she operated the vehicle, was unconstitutional because the State failed to establish a clear, logical nexus between chemical breath alcohol concentration at the time of the test and breath alcohol concentration at the time of her operation of the vehicle. Thus, her first issue raised was whether the trial court erred in allowing the State the benefit of the statutory presumption.

The Court of Appeals held that the State was entitled to the benefit of the permissive presumption contained in I.C. 9-30-6-1(b) thereby upholding the constitutionality of this presumption. The Court of Appeals gave three reasons why the defense challenge to the presumption fails. First, there is no fundamental right to drive a motor vehicle. Driving is a privilege. By enjoying the privilege, the defendant consented to be subject to the legislation governing the use of the privilege. Second, the permissive presumption found in I.C. 9-30-6-15(b) was created by the legislature, and it is within the legislature's exclusive prerogative to determine its applicability. Having met the requirements established by the legislature to raise the presumption, the State was entitled to the presumption found in the statute. The Court of Appeals refused to reweigh the facts in light of the plain language of I.C. 9-30-6-15(b) and stated that Johnson's argument is with the legislature that had the authority to establish the criteria for the presumption. The Trial Court was obligated to follow the law, and the Court of Appeals was not persuaded that the trial court erred on this point. Finally, the Court was simply not persuaded by the defendant's argument that the scientific principles espoused in the journal article she submitted in support of her motion in limine was sufficient to rebut the permissive presumption. Therefore, the Court of Appeals could not find any abuse of discretion by the Trial Court in allowing the State to rely on the presumption contained in I.C. 9-30-15(b). ✦

♦ *Crawford Objection to Admissibility of DataMaster Certification and Breath Test Ticket*

During the trial, the defense also objected to the admission and publication of the DataMaster certification and to the DataMaster breath test result ticket. Both exhibits were admitted by the trial court over defense objection thereby raising the second issue on appeal, whether the trial court improperly admitted the DataMaster certification. Although I. C. 9-30-6-5(b) provides for the admission into evidence of the DataMaster certification, the defendant took issue with the language on the relevant DataMaster certification that "The instrument is in good operating condition, satisfying the accuracy requirement set out by the Stated Department of Toxicology Regulations". The defendant raised a *Crawford* challenge to the admission of the DataMaster exhibit arguing that the State "exceed[ed] the foundational limits allowed under [Indiana Code §] 9-30-6-5(b), [and] converted the Certificate…to a testimonial document" and cited *Napier v. State,* 820 N.E. 2d 144 (Ind. Ct. App. 2005) (*Napier I), modified on rehearing,* 827 N.E. 2d 565 (Ind. Ct. App. 2005) *(Napier II),* and *Jarrell v. State,* 852 N.E. 2d 1022 (Ind. Ct. App. 2006).

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Finding the State's counter argument that the defendant's reliance on these cases is misplaced because the cases merely held that the admission of the DataMaster certification did not violated the hearsay rule and did not implicate the Sixth Amendment rights of confrontation , the Court of Appeals provided a detailed primer of its holdings in the previous cases cited by defendant addressing the applicability of the rule set forth in *Crawford* as it relates to the method of establishing a proper evidentiary foundation for the admissibility of the various documents used to prove the chemical breath test results. The Court of Appeals disagreed with Johnson's arguments that by the use of the "bolstering" language on the certification, the State had exceeded the foundational requirements and converted the DataMaster certification into a testimonial document and had exceeded the scope of I.C. 9-30-6-5. The Court of Appeals relied on its previous holding in *Napier I* that "the procedures permitted by our supreme court and our legislature for establishing a foundation for the admission of the certifications regarding the breath test machine and the regulations of the Toxicology Department did not run afoul of the rule…in *Crawford* and the Confrontation Clause." *Napier I,* 820 N.E. 2d at 150. Based upon these holdings and the fact that the legislature has neither repealed, invalidated or otherwise qualified the application of I.C. 9-30-6-5(c) (1), the Court of Appeals rejected Johnson's challenge that the trial court erred in admitting the DataMaster certificate and found no *Crawford* violation or abuse of discretion. The trial court was affirmed. ✦

♦ *State v. Eichhorst,* 879 N.E.2d. 1144, (Ind. Ct. App. 2008).

In *State v. Eichhorst,* 879 N.E.2d. 1144, (Ind. Ct. App. 2008), decided by a different panel of the Court of Appeals, the Court addressed the issue whether a blood test result obtained by the hospital for medical purposes and provided to the prosecution pursuant to a *subpoena duces tecum* was admissible into evidence absent the defendant's consent to the blood test and absent compliance with HIPPA. Ali Eichhorst was the driver of a vehicle involved in a one car accident in April 2006. Her sister, a passenger in the vehicle was killed. Eichhorst was ejected from the inverted vehicle and her arm was pinned under the vehicle. The deputy at the scene asked another officer to "go to the hospital" and asked for a blood draw from Eichhorst. The treating physician at the hospital ordered lab tests and x-rays, including blood tests to determine, among other things, Eichhorst's alcohol level to "be able to treat her in the best possible way." These medical tests were ordered due to Eichhorst's injuries and because of the doctor's observations that she was loud and calling out, she was uncooperative, and she had a very strong smell of ethanol on her. The blood test result revealed a blood alcohol level of 0.276. Later, the State obtained a *subpoena duces tecum* for the defendant, Eichhorst's medical records from the hospital, including the blood test results.

The defendant was subsequently charged with operating a vehicle while intoxicated causing death, a class C felony and operating a vehicle with an alcohol concentration equivalent to at least .08 gram of alcohol but less than .15 gram of alcohol in blood or breath resulting in death, a class C felony. The defendant filed a motion to suppress the blood alcohol test results processed by both the police and the Hospital. The State conceded that the results of the blood draw provided to police were inadmissible because the deputy did not have probable cause to believe Eichhorst was intoxicated at the time of the blood draw. The defendant argued that the medical records containing the blood test result obtained from the hospital were not admissible because she didn't consent to the treatment, the blood draw was unnecessary for medical treatment purposes, the *subpoena duces tecum* was overly broad in scope, and her rights under the Health Insurance Portability Act of 1996 (HIPPA) were violated by the release of the medical records pursuant to the *subpoena duces tecum*. In response, the State argued that the *subpoena duces tecum* was reasonable and in compliance with HIPPA, the treatment was medically necessary, Eichhorst was incapable of giving informed consent to the testing and treatment due to her intoxication, and her consent was not relevant because the evidence was obtained pursuant to a *subpoena duces tecum*. The trial court granted the Motion to Suppress, and the State appealed. ✦

♦ *Admissibility of Hospital Blood Test Results Obtained by Prosecutor's Subpoena Duces Tecum*

The issue on appeal in *Eichhorst* is whether the trial court abused its discretion by granting the defendant's motion to suppress the hospital blood test results obtained by the State by a valid *subpoena duces tecum*. The Court of Appeals emphasized that it was addressing only the results of the Hospital's blood test because the State had conceded at the trial level that the deputy sheriff did not have probable cause to request a blood draw for the police. In reviewing the admissibility of the hospital records under I.C. 9-30-6-6(a), the Court of Appeals relied upon its previous holdings in *Shepard v. State*, 690 N.E. 2d 318, 328 (Ind. Ct. App. 1997), *trans. denied* and *Hannoy v. State,* 789 N.E. 2d 977, (Ind. Ct. App. 2003) that the statute allows police to obtain the sample and/or the results of the analysis of the sample that has already been collected when the results are needed as part of a criminal investigation and that I.C. 9-3-6-6(a) is a constitutional statute under the Fourth Amendment in that there is little or no reasonable expectation of privacy in blood alcohol test results obtained by a hospital as part of consensual treatment where the results are requested by law enforcement for purposes of investigating an automobile accident. Thus, as previously held in *Hannoy*, the Court said, police

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may "acquire test results that medical personnel have obtained during the normal course of treatment".

Despite I.C. 9-30-6-6(a) and the *Hannoy* case, the defendant argued on appeal that the police could not obtain her medical records because she did not consent to the treatment, the treatment was not medically necessary, and *Hannoy* is no longer valid due to HIPPA thereby raising the issue of her consent to the blood draw or lack thereof as a bar to the admissibility of the results at trial. In rejecting this argument that the defendants' medical records should be suppressed because she did not "consent", the Court of Appeals again referred to the *Hannoy* case in which it has already considered the issue of patient consent and whether treatment was medically necessary in the context of deciding whether the driver had a reasonable expectation of privacy in his medical records. The Court of Appeals held that consent to health care treatment is not required in an emergency or when the patient is too intoxicated to give consent. Thus, the defendant's refusal of treatment in this case is not relevant because her consent was not necessary for two reasons, the emergency situation and her intoxication. The Court then rejected the defense arguments that the blood test was not medically necessary and was done solely for the needs of law enforcement in its investigations. The Court of Appeals held in *Eichhorst* that "Eichhorst's consent to the blood draw was not necessary and the blood draw was medically necessary" and further that "the blood draw was not performed solely to serve the needs of law enforcement." ✦

♦ *HIPPA*

State v. Eichhorst is the first case in Indiana to consider the applicability of the Health Insurance Portability Act or HIPPA in obtaining medical records for purposes of criminal investigations and prosecutions. After concluding that the defendant, Eichhorst, did not have a reasonable expectation of privacy in the hospital medical records under *Hannoy,* the Court of Appeals proceeded to address the defendant's argument that law enforcement may no longer rely on I.C. 9-30-6-6(a) to obtain medical records without judicial process but are bound by HIPPA which supersedes the state statute and dictates the disclosure of protected health information without patient authorization and proper judicial process. Simply, the defense argued that the *subpoena duces tecum* did not conform to HIPPA, therefore, the medical records were not admissible.

Since it was undisputed that her medical records were provided to the prosecutor pursuant to a *subpoena duces tecum* issued by a judicial officer, Eichhorst argued that the *subpoena duces tecum* was improper based on *Oman v. State,* 737 N.E. 2d 1131 (Ind. 2000), *reh'g denied, cert. denied*, 534 U.S. 814, 122 S.Ct. 38 (2001). The Court of Appeals rejected this argument. The Court of Appeals then reviewed *Oman* and found that *Oman*, an Indiana Supreme Court case, reaffirmed a reasonableness standard instead of a probable cause standard for the issuance of investigative subpoenas and set forth the factors the court should consider in determining whether an investigative subpoena is "reasonable" under the Fourth amendment. To be reasonable, the investigative subpoena must be 1) relevant in purpose; 2) sufficiently limited in scope; and 3) specific in directive so that compliance will not be unreasonably burdensome. After reviewing the facts in Eichhorst against the reasonableness standard announced in *Oman*, the Court considered the defense argument against the propriety and reasonableness of the subpoena duces tecum in light of another case decided by the Indiana Supreme Court subsequent to *Oman, Forbes v. State,* 810 N.E. 2d 681 (Ind. 2004). According to the Court, Eichhorst's argument relates to the "relevant" in purpose" prong of the test announced in *Oman.*

To the Court of Appeals, Eichhorst was essentially arguing that the information provided by a nurse that the defendant smelled of alcohol could not be a basis for a reasonable investigation because the information was disclosed in violation of HIPPA. The Court rejected this argument stating that the initial basis for investigating Eichhorst was not the information provided by the nurse but was the fact that Eichhorst was driving a vehicle involved in an accident and the accident itself was the event that was the initial evidentiary basis for the prosecutor's legitimate inquiry into a possible OWI offense.

Further the Court noted that HIPPA provides for civil and criminal penalties for improper disclosures of medical information. The recourse for the individual whose HIPPA rights have been violated is to file a complaint with the Office of Civil Rights, Department of Health and Human Services. There was no authority cited by Eichhorst for the proposition that evidence given to the State in violation of HIPPA should be suppressed or excluded in the criminal setting, and there is no such remedy in HIPPA. Thus, the Court of Appeals citing *U.S. v. Zamora,* 408 F. Supp. 2d (S.D. Texas 2006) held that "HIPPA was passed to ensure an individual's right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings." The deputy sheriff in Eichhorst was conducting an investigation that was reasonable, and the subpoena for the medical records was "relevant" in purpose. Therefore, the Court of appeals held that the *subpoena duces tecum* for Eichhorst's hospital records was reasonable, and the trial court abused its discretion in granting the motion to suppress the hospital blood test results. The Eichhorst case has been reversed and remanded for proceedings consistent with the Court of Appeals opinion. ✦